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No. 00-1491

In The

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,

Petitioner,

v.

GUILLERMO NUEVA & LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACQUELINE JORDAN LEUNG
(Counsel of Record)
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street
25th Floor
Oakland, CA 94604
(510) 834-4350

SANDRA B. STERN
THE LAW OFFICES OF SANDRA B. STERN
16133 Ventura Boulevard
Suite 1280
Encino, CA 91436-2416
(818) 905-5667

ROBERT J. STOLL, JR., ESQ.
STOLL, NUSSBAUM & POLAKOV
11601 Wilshire Boulevard
Suite 200
Los Angeles, CA 90025
(310) 996-7500

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Form MCS-90 Endorsement, issued with a motor carrier's liability insurance policy which defines "insured" to include permissive users of the motor carrier's owned, covered vehicles, requires the issuing insurer to pay a final judgment entered against a permissive user of the motor carrier's owned vehicle when that vehicle is not specifically described in the policy.

DISCLOSURE PURSUANT TO RULE 29.6

Respondents are the Los Angeles County Metropolitan Transportation Authority, a public corporation of the State of California, organized under the authority of Section 30,000 et seq. of the Public Utilities Code, and Guillermo Nueva, an individual. The Los Angeles County Metropolitan Transportation Authority has no parent company and is not a publicly held company.

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STATEMENT OF THE CASE

In response to the possibility that injured members of the public would be without redress against negligent operators of Interstate Commerce Commission ("ICC") regulated vehicles, Congress enacted the Motor Carrier Act of 1980. Congress directed the ICC to promulgate regulations requiring that all operators of regulated motor vehicles be able to respond in damages to an injured member of the public. The ICC drafted the MCS-90 Endorsement to meet this requirement and required that it be added to all regulated carriers' automobile policies.[1]

Respondents were injured in an accident when the permissive users of a vehicle owned by John Deere's named insured, Baljit Singh Sahota dba Sahota Trucking ("Sahota"), slammed into Respondents' vehicle. The insurance policy John Deere issued to Sahota contained an MCS-90 Endorsement providing that John Deere would pay all judgments rendered against the "insured" for any liability arising out of the use of any vehicle.

John Deere contends that the "insured" means only its named insured Sahota, and not any persons using Sahota's owned vehicles with Sahota's permission.[2]

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[1] It is the effect of the MCS-90 Endorsement on this case that is at issue. If Petitioner John Deere Insurance Company has its way, the MCS-90 Endorsement would be meaningless in this case and Respondents, as injured members of the public, would be without redress, frustrating express Congressional mandates.

[2] Contrary to its own policy language which defines "insured" to include permissive users.

Respondents contend that the plain language of the MCS-90, and the legislative history and public policy behind it, expand the definition of "insured" to include permissive users of Sahota's non-scheduled, but owned vehicles. Respondents further contend that given this "expansion" of the definition of "insured" under the John Deere policy, John Deere must pay the judgments rendered against the permissive users. The Ninth Circuit agreed with Respondents. Now, John Deere wants the Ninth Circuit's decision overturned.

John Deere bases its petition on an asserted conflict between the United States Courts of Appeals, as is required to invoke this Court's discretionary review. (United States Supreme Court Rule 10) However, there is *absolutely no conflict* between the only two Circuits which have addressed these issues on these facts, the Ninth and Tenth. **They are in complete agreement.** The four cases John Deere cites to show the purported "conflict" in fact do not give rise to one. John Deere's chief reason for granting the writ thus fails. John Deere's ancillary reasons for granting the writ are similarly meritless.

John Deere knew that by the mandatory inclusion of the MCS-90 Endorsement on its policy insuring Sahota it might be required to indemnify for claims not covered by the basic policy. This is the whole point of the MCS-90 endorsement. Despite knowledge that it might be called upon to pay judgments for accidents caused by permissive users of its insured's owned vehicles, John Deere now cries foul, citing a purported "conflict" among the Circuit Courts which does not actually exist. If this request is granted and the decision of the Ninth Circuit overturned, the result will be that injured members of the

public will be left without any remedy whatsoever. Simply put, John Deere wants to avoid paying judgments rendered against persons using Sahota's vehicles with Sahota's permission. If it is allowed to do so, the purpose behind the MCS-90 Endorsement, the protection and indemnification of the public, would be thwarted. This must not occur, and the writ must be denied.

A. Factual Background.[3]

This case arises out of a November 24, 1995 vehicle accident in which a bus belonging to Respondent Los Angeles County Metropolitan Transportation ("LACMTA") was totaled and Respondent Guillermo Nueva ("Nueva"), LACMTA's employee driver, was severely injured. The bus was hit by a tractor/trailer rig driven by Gurmukh Singh Garcha ("Garcha").[4] The tractor was owned by Inderjit Singh and Gurmukh Singh Garcha dba Blue Star Trucking ("Blue Star"). **Garcha and Blue Star lacked their own insurance[5] at the time of the accident and are without assets to satisfy the judgments against them.**

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[3] In addition to the following, the decision of the Ninth Circuit below sets forth the relevant procedural events of this case and the relevant factual information. (Petition at App. A, pages 1a to 15a)

[4] Fortuitously, with the exception of Nueva, the bus was unoccupied at the time of the collision or there would be multiple claims in the multi-million dollar range.

[5] Except for being permissive user "insureds" under the Sahota policy, to be discussed below.

It is undisputed in this case that on the date of loss Sahota was the registered owner of the trailer portion of the rig being driven by Garcha. Sahota gave permission to Garcha and Blue Star to use the trailer in its trucking operations without confirming that Garcha or Blue Star had their own liability insurance to protect the members of the general public.

At the time of the accident, Sahota was the named insured on a policy issued by John Deere. With the knowledge and in anticipation that Sahota would be giving permission to others to operate its owned vehicles, the John Deere policy specifically included permissive users of Sahota's owned vehicles as "insureds" under the policy.[6] An MCS-90 Endorsement was attached to the policy at its issuance and was in effect at the time of the accident.

B. Procedural Background

Respondents LACMTA and Nueva sued Garcha, Blue Star and Sahota in the Los Angeles County Superior Court for damages and injuries they sustained due to the subject accident ("the underlying action"). John D[illegible]e was on full notice of these claims and defended Sahota throughout the underlying action. Respondents settled with Sahota for the statutory financial responsibility limits of liability for registered vehicle owners in the State of California, funded by John Deere. Respondents then obtained default judgments against Garcha and Blue

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[6] See Petition at App. A, pages 4a-5a.

Star, as permissive users of Sahota's vehicle. John Deere was provided with notice of all the proceedings, including the notices of and requests for default, but **voluntarily did nothing to prevent the defaults being taken.**

John Deere then brought suit against Respondents in the United States District Court, Central District of California, seeking a declaration that it had no duty to pay judgments entered against anyone but its named insured Sahota. LACMTA filed a counterclaim seeking declaratory judgment regarding who is an "insured" under the John Deere policy, as modified by the MCS-90 Endorsement, and regarding John Deere's duty to pay final judgments rendered against its "insureds," including permissive users of Sahota's vehicles. The District Court determined that John Deere had no duty to pay any judgments rendered against Garcha and Blue Star.

On appeal, the Ninth Circuit followed *Adams v. Royal Indemnity*, 99 F.3d 964 (10th Cir. 1996), the only published opinion specifically addressing the same fact pattern and interpreting the language of the MCS-90 Endorsement with reference to that fact pattern, and overruled the District Court.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Federal Circuit Courts Of Appeal In Determining The Scope And Application Of An MCS-90 Endorsement To The Facts Of This Case.

John Deere recognizes that in order to invoke the discretion of this Court via petition for certiorari, its best

hope lies in arguing that there is a conflict among the United States Courts of Appeal with respect to the issues decided by the Ninth Circuit Court of Appeal in this case. (United States Supreme Court Rule 10.) However, the Ninth Circuit used as the basis for its holding the **only** other United States Court of Appeal decision that deals with the application of an MCS-90 Endorsement to essentially identical facts, *Adams v. Royal Indemnity*, 99 F.3d 964 (10th Cir. 1996). Thus, the only two United States Court of Appeals' decisions pertaining to these issues *each result in an identical holding*.

John Deere frantically searches for cases which might show the required conflict, but can present only four cases, **all predating the enactment of the MCS-90 Endorsement at issue by the Motor Carrier Act of 1980.** Unfortunately for John Deere, these cases are distinguishable on both their facts and their law. There is simply no conflict among the circuits.

A. The Tenth Circuit And The Ninth Circuit Are In Complete Agreement.

John Deere admits that the Tenth Circuit's decision in *Adams* and the decision by the Ninth Circuit in this case are essentially identical. (Petition, page 25) John Deere's argument against *Adams* (and, by extension, the Ninth Circuit's decision) is that it "fundamentally misunderstands the operation of the MCS-90 and the protection it affords." (Petition, page 25) To the contrary, the Tenth Circuit and the Ninth Circuit both understood the fundamental purpose of the MCS-90 endorsement: to protect the public.

Adams was injured by a tractor-trailer driven by John Hofer, who was using the trailer with the permission of Geigley, who in turn had leased Trailer 701 from its owner, Cactus County Distributing ("Cactus County"), a partnership which included Raymond D. Thomas ("Thomas"). *Id.* at 965-966. Adams brought suit against Hofer[7] and ultimately obtained a $1,000,000.00 default judgment. After Adams was unsuccessful in collecting the judgment from Hofer, he brought an action against Royal Indemnity Company, which had issued a policy to Geigley containing an MCS-90 Endorsement. *Id.* at 965.

The District Court granted Royal's motion for summary judgment, concluding that because the Geigley policy limited the definition of "insured" by requiring the use of a "covered auto" to be involved, Hofer was not an "insured" under that policy because Trailer 701 was not a "covered auto." The District Court also concluded that the MCS-90 Endorsement on the Geigley policy did not oblige Royal to pay the judgment against Hofer because Hofer could not be considered an "insured" under the Geigley policy, and thus would not be an "insured" under the language of the MCS-90 Endorsement. *Id.* at 966.

On appeal, the Tenth Circuit concluded that Trailer 701 was not a "covered auto" under either the Geigley policy or the Thomas policy, because the coverage provided in each was Symbol 46 coverage (covering "Specifically Described Autos", which is the same type of coverage present in the basic John Deere policy insuring Sahota). Since neither policy specifically described Trailer

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[7] Adams did **not** sue Geigley, Cactus County, or Thomas.

701, and neither named insured owned Trailer 701, it was not a "covered auto" as the basic policies defined that term. *Id.* at 967. The Tenth Circuit also concluded that Hofer was not an "insured" under the basic policies either. *Id.* at 969-970.

The Tenth Circuit then considered the effect of the MCS-90 Endorsement contained in the Geigley policy. In doing so, it looked to Congress's paramount policy of protecting the public by mandating MCS-90 Endorsements and further noted that "[b]y requiring all such described insurance policies to contain this [MCS-90] endorsement, the [Interstate Commerce Commission] prevents the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public." *Id.* at 969-970. The Tenth Circuit also noted that to the extent a claim was not covered under the main policy but was covered under the MCS-90 Endorsement, the insured would have to reimburse the insurer, i.e., the limitations of coverage are still effective as between the insured and the insurer. This balanced the public policy of "protecting the public from uninsured vehicles utilized by interstate carriers with the policy of permitting insurance companies to bargain with their insureds regarding how to allocate such coverage among themselves." *Id.* at 969.

The Tenth Circuit addressed the issue of whether Hofer could be considered an "insured" under the Royal policy insuring Geigley *after the policy is modified by the endorsement*. The Court specifically noted that it had to "clearly keep in mind that Adams was, and is, **a member of the general public, which is precisely the group that**

is intended to be protected by this ICC endorsement." *Id.* at 969 (Bold added).

The Tenth Circuit concluded that the definition of "insured" in the Royal policy was "indirectly modified" by the MCS-90 Endorsement's use of the word "insured." Just as the MCS-90 Endorsement applied to all regulated vehicles, whether specifically described in the policy or not, the limiting definition of an "insured" in the policy (a person who "owns, hires, or borrows only specifically described motor vehicles") was expanded to mean all persons using regulated vehicles with the permission of the named insured. Using the more limited definition would subvert the purpose of the MCS-90 Endorsement of requiring coverage on all regulated vehicles regardless of whether or not they are specifically identified in the basic policy. The Court then held:

> **A policy with this ICC endorsement cannot explicitly limit liability to those vehicles specifically described therein, nor can it indirectly so limit coverage by attempting to define who is insured in terms of specifically described vehicles.** . . . [P]. Here, the ICC endorsement must be read to eliminate the limiting clause that coverage applies only to covered autos described in Item Four. Thus, the definition of insured in the policy, as so modified, would effectively read: **"Anyone else is an insured while using with your permission an auto you own, hire or borrow . . . "** (citation) *Id.* at 969-970 (Bold added).[8]

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[8] The Tenth Circuit cites several cases as authority to support its holding, including *Empire Fire and Marine Ins. v.*

The Tenth Circuit noted that this interpretation was consistent with the purpose of the MCS-90 Endorsement:

> By deleting the policy requirement that an insured is defined in terms of described autos, the insurer assumes the role mandated by Congress and the ICC of protecting the public from interstate truckers who either themselves utilize, **or give permission to others to utilize,** uninsured vehicles which they own, hire, or borrow, but which are not listed in their insurance policies. *Id.* at 971 (Bold added).

In the instant case, the Ninth Circuit recognized immediately that *Adam's* factual scenario was "nearly identical" to the case before it (Petition at App. A, page 11a):

- As in *Adams,* the instant case involves injured members of the public (LACMTA and Nueva) as adversaries against an insurer (John Deere), contesting coverage under an MCS-90 Endorsement;
- The MCS-90 Endorsements included in the *Adams* insurance policies and the John Deere policy here contain the same federally-mandated language regarding the inefficacy of limitations contained within the bodies of the policies;

Guaranty Nat'l Ins., 868 F.2d 357, 363 (10th Cir. 1989) and *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 610-611 (5th Cir. 1989). *Adams, supra,* at 969-970. Its holding is also in conformity with the substantive law in California with regard to insurance policy interpretation, i.e., courts will give effect to a specific endorsement when it conflicts with boilerplate policy provisions. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Coss,* 80 Cal.App.3d 888, 893 (1978).

- Like the Geigley policy in *Adams*, the basic John Deere policy's definition of WHO IS AN INSURED is: "**Anyone else while using with your permission a covered 'auto' you own, hire, or borrow**" (Bold added);

- The Great Dane Trailer, like Trailer 701 in *Adams*, is not a specifically described "covered auto" under the basic John Deere policy;

- Like Hofer in *Adams*, neither Garcha nor Blue Star was a "named insured" under the basic John Deere policy;

- As in *Adams*, Garcha and Blue Star were using the trailer with Sahota's permission;

- It was undisputed that Sahota owned the Great Dane Trailer at the time of the subject accident;

- It was undisputed that the Great Dane Trailer was a vehicle subject to ICC regulations (Petition at App. A, pages 3a-7a, 11a-15a).[9]

Based upon this remarkable similarity of facts, the Ninth Circuit held that, although neither Garcha nor Blue Star was a "named insured" under the basic John Deere policy, the MCS-90 Endorsement in effect expanded the definition of "insured" under the John Deere policy to read "anyone else is an insured while using with [Sahota's] permission an auto [Sahota] own[s], hire[s] or borrow[s] regardless of whether or not such auto is specifically described in the policy." Since at the time of the

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[9] Indeed, Petitioner admits that "[t]he underlying facts are not in dispute." (Petition at page 7)

subject accident Garcha and Blue Star were using a vehicle owned by Sahota with Sahota's permission, the Ninth Circuit held that pursuant to the Tenth Circuit's holding in *Adams* and the expanded definition of "insured" under the John Deere policy, Garcha and Blue Star were "insureds" under the John Deere policy for the purposes of the MCS-90 Endorsement. Thus, John Deere had a duty to respond to any judgments entered against Garcha and Blue Star. (Petition at App. A, pages 12a-15a).

In reaching its holding, the Ninth Circuit considered the same argument being asserted by John Deere now and concluded that the limited definition of "insured" under the John Deere policy could not stand in light of the facts of this case:

> John Deere asks us to read the use of the word "insured" in the endorsement as referring only to its named "insured", Sahota. In other words, John Deere maintains that the MCS-90 only negates the "covered auto" limitation with regard to the named insured, and would not impact its obligations regarding permissive users. However, we decline to limit the endorsement in this manner. Under John Deere's proffered interpretation, the MCS-90 negates the express provision in part (a) of the "WHO IS AN INSURED" section of the policy which limits coverage to only "covered autos." This is so because without the endorsement, Sahota would not be an "insured" under the policy if he caused injury while driving a non-covered auto. It is the endorsement that would transform him into an "insured". **Thus, it is inescapable that the effect of the MCS-90 Endorsement is to**

> **modify the policy's definition of an "insured" . . . .**
>
> We conclude that the MCS-90 operates exactly in the same manner when applied to the definition of "insured" in part (b) as it does when applied to part (a) [of the "WHO IS AN INSURED" section of the John Deere policy]. In both cases, the MCS-90 negates the limitation that only users of "covered autos" are "insureds." Therefore, we conclude that under the policy before us, John Deere cannot avoid indemnifying Garcha and Blue Star by relying on the policy's narrow definition of "insured" which attempts to limit that status to permissive users of solely "covered autos". See *Adams*, 99 F.3d at 970.

Further, the Ninth Circuit observed that its holding in turn advanced the paramount purpose behind the MCS-90 Endorsement, the protection of the public:

> Under these circumstances, the MCS-90 serves the purpose it was expressly designed to serve, modifying a policy to insure the availability of insurance for negligently injured members of the public. Interpreting the endorsement in the way advocated by John Deere would frustrate this express Congressional goal. (Petition at App. A, pages 13a-14a, bold added)

The Tenth Circuit and the Ninth Circuit are the only Circuits which have dealt with the specific factual and legal issues presented. These Circuits are in complete agreement: when an entity uses, with the named insured's permission, a vehicle owned, hired, or borrowed by the named insured, that entity is an "insured" with respect to liability owed to injured members of the

public, and the insurer is obligated to pay any final judgments obtained by injured members of the public against the "insured." There is simply no conflict among the Circuits.

B. The Cases John Deere Cites To Show A Conflict Actually Pre-Date The Enactment Of The MCS-90 Endorsement At Issue And Therefore Never Interpret The Endorsement At Issue.

John Deere cites several cases for the proposition that "an insurer's obligation under the MCS-90 . . . is triggered only by the entry of judgment against the motor carrier named in the insurance policy to which it is attached." (Petition at page 20). These cases do not stand for that proposition, and in any event are factually and legally inapposite.[10]

John Deere contends *National Mutual Ins. Co. v. Liberty Mutual Ins. Co.*, 196 F.2d 597 (D.C. Cir. 1952), *cert. den.*, 344 U.S. 819 (1952) holds that the "then-required 'ICC endorsement' . . . did not modify the definition of 'insured' in the underlying policy." (Petition at page 20). John Deere is incorrect; *National Mutual* does not make that holding.

Instead, *National Mutual* holds that, **as between insurers**, the paramount policy of protecting injured

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[10] The most obvious flaw in John Deere's citation of these cases is that all of these cases were decided prior to 1980, and therefore **pre-date** the Motor Carrier Act of 1980. The MCS-90 Endorsement at issue is a product of the Motor Carrier Act of 1980 and therefore came into existence **after** all the cases cited by John Deere were decided. 49 C.F.R. § 387.15; see also MCS-90 Endorsement (Petition at App. E, page 40a).

members of the public is not implicated, and the limitations of their respective policies remain in effect in determining which insurer should bear the ultimate loss. *Id.* at 598, 600. This holding is in line with the law of multiple Circuits – that in disputes between insurers, one of which provides coverage under the policy and one of which provides coverage only because of the existence of the MCS-90 endorsement, the public policy considerations do not apply because the public is already protected by the insurer who provided the basic coverage. See, e.g., *Redlands Ins. Co. v. Shelter Mut. Ins. Co.*, 193 F.3d 1021, 1022 (8th Cir. 1999); *Adams, supra*, 99 F.3d at 969; *John Deere Ins. Co. v. Truckin' U.S.A*, 122 F.3d 270, 275 (5th Cir. 1997); *Canal, supra*, 889 F.2d at 610; *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 (7th Cir. 1985); *Allstate Ins. Co. v. Liberty Mut. Ins. Co.*, 368 F.2d 121, 125 (3rd Cir. 1976); Petition at App. A, pages 9a-11a.[11]

In *Adams* and this case, as observed above, injured members of the public are seeking compensation directly from the insurance carrier and have no recourse against any other policy. This is precisely the situation which puts the MCS-90 Endorsement and its expansion of the definition of "insured" into action. It is thereafter the insurer's burden to determine the ultimate allocation of the loss, which it can do by obtaining reimbursement from its insured. Since the primary goal of protection of the public was not at issue in *National Mutual*, that case is inapposite, both factually and legally, to the instant case.

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[11] The specific language of the MCS-90 Endorsement also reflects this understanding. (Petition at App. E, pages 42a-43a)

The same can be said of *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131 (8th Cir. 1974), which John Deere states "followed [*National Mutual's*] basic approach and reasoning." (Petition at page 21) *Wellman* does not even cite *National Mutual*, but if it did that citation would be without aid to John Deere's argument.

Wellman is inapposite for other reasons, as well. *Wellman* involved an accident which occurred when a vehicle, leased to Liberty Mutual's named insured and driven by the vehicle's owner/operator, struck and injured a third party. *Id.* at 133-134. After the District Court concluded Liberty Mutual's policy would provide coverage for the vehicle's owner/operator, the Eighth Circuit overturned the decision.

The Eighth Circuit construed then-applicable (1969) law and held that when a named insured lessee-motor carrier's ICC permit numbers were displayed on the lessor's vehicle, the owner/operator of the vehicle was operating it as a matter of law with the named insured lessee's permission. Accordingly, the Eighth Circuit found that since the driver of the named insured's vehicle was a permissive user, the driver was also an "insured" under the definition of that term within the Liberty Mutual policy. *Id.* at 136-137.

The Eighth Circuit then addressed an exclusion added to the policy by endorsement. The Eighth Circuit concluded that although there was an exception to the exclusion for "employees" of the named insured, and although the owner/operator would be deemed a "statutory employee" of the named insured (under ICC regulations) for liability purposes, he would not be classified as

an employee of the named insured for insurance purposes. Thus, the Eighth Circuit concluded the exclusion precluded coverage for the owner/operator additional "insured." *Id.* at 137.

As these facts show, *Wellman* **did not even involve the application or interpretation of an MCS-90 Endorsement** (or the BMC-90).[12] Indeed, nowhere in *Wellman* is the word "MCS-90" found.[13] The only "endorsement" the Eighth Circuit considered was an exclusionary endorsement attached to the policy. *Id.*

In fact, the *Wellman* court actually **invited** Congress to adopt an endorsement mandating coverage for permissive users of the named insured's vehicles, such as the MCS-90 Endorsement at issue. As the *Wellman* court stated:

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[12] This is despite Petitioner's erroneous assertion that *Wellman* dealt with "the liability of an insurer of an interstate motor carrier under the MCS-90", and that the injured party argued the effect of the "endorsement and regulations." (Petition at page 21-22)

[13] The *Wellman* court's examination of 1969 law extended only to the effect of 49 C.F.R. § 1057.4 [which had the effect of preventing a lessee motor carrier from immunizing itself from the negligence of drivers who operated their vehicles by claiming the drivers were "independent contractors," see, e.g., *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir. 1979), *cert. den.*, 444 U.S. 965 (1979)], an ICC "regulation which in no way relates to or binds insurance companies." *Id.* at 139. This is in stark contrast to the MCS-90 Endorsement, and the regulations and code sections from whence it came (see, e.g., 49 C.F.R. § 387.15), **which directly operate to bind insurance companies**, requiring them to compensate injured members of the public when the situation dictates. *Wellman* is thus of no utility to Petitioner.

> We think it highly unfortunate that the ICC has not established a clearer requirement that motor vehicle common carriers' liability policies, filed pursuant to the Interstate Commerce Act, must extend coverage to the owner-operator of a leased vehicle to the same extent as that afforded the lessee-common carrier. Under such a requirement, insurance coverage would extend to cover the vehicle driver at all times. *Id.* at 139.

Accepting that invitation seven years later, Congress enacted the Motor Carrier Act of 1980, and the ICC promulgated 49 C.F.R. § 387.15, which requires the insurer to pay any final judgment against the "insured", as opposed to the "named insured", resulting from the negligent operation of the named insured's owned vehicles, thereby mandating coverage for permissive users.

Nor does *White, supra,* 599 F.2d 50, support John Deere's argument at all. Indeed, *White* is a *workers' compensation* case dealing with concepts utterly foreign to the instant case. *Id.* at 51. The Fifth Circuit Court of Appeals concluded that "motor carriers who are by federal law burdened with statutory employer liability for the acts of vehicle lessors are also entitled to the protection afforded employers by state law." *Id.* at 51.

In reaching this conclusion, the Fifth Circuit obliquely referenced then-existing federal statutory law pertaining to the liability of motor carriers arising out of the use of "motor vehicles not owned by them." *Id.* at 53, footnote 2, and 55. These statutes were enacted to prevent the lessee motor carrier from immunizing itself from the negligence of drivers who operated their vehicles by

claiming the drivers were "independent contractors." *Id.* at 52. The Fifth Circuit stated that, even if plaintiff had obtained a judgment against the named insured motor carrier, since the decedent was an employee of the motor carrier and not a member of the "public" for the purpose of these statutes, the public policy to protect the "public" was not invoked. *Id.* at 55.

Like *Wellman*, *White* does not involve the interpretation or application of an MCS-90 Endorsement or a BMC-90 Endorsement. Instead, *White* deals with statutory language applicable when the motor carrier ***does not*** own the motor vehicle at issue. In the case at bar, it is undisputed that at the time of the subject accident, Sahota was the owner of the trailer being operated by Sahota's permissive user. *White* is thus of no use to John Deere.

Nor does the last case cited by John Deere, *Carolina Casualty Ins. Co. v. Insurance Co. of North America*, 595 F.2d 128 (3rd Cir. 1979), support its argument.[14] Even a cursory review of *Carolina Casualty* reveals that it does not support John Deere's argument. Unlike the instant case, *Carolina Casualty* involved a dispute between two insurers, one insuring the motor carrier/lessee and the other insuring the lessor/owner and its driver. *Id.* at 130,

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[14] For some reason, John Deere cites this case for the proposition that the Third Circuit has joined "the majority" of courts "by indicating that federal law governing motor carriers does not require an insurer to pay judgments against parties other than its own insured." (Petition at page 24) It is incredible that John Deere would state that there are a "majority of courts" which so hold, yet it only cites *four* cases, all pre-dating the enactment of the Motor Carrier Act of 1980, to back up this blatantly erroneous assertion.

131. The issue presented was one of primary versus excess coverage. *Id.*

The issues presented in *Carolina Casualty* differ from the case at bar. As the authorities cited above show, the particular considerations and public policy behind the MCS-90 Endorsement's expansion of coverage to non-described vehicles do not apply to inter-insurer disputes. Even so, while interpreting the 1977 Interstate Commerce Act, the predecessor to the 1980 Motor Carrier Act at issue, the Third Circuit still chose to set forth its understanding that members of the public are meant to receive protection against the negligence of operators of ICC regulated vehicles as follows:

> We may assume without deciding, that if [the motor carrier] as the holder of the ICC permit, were the only available defendant in this case, it could not escape these significant duties of care and financial accountability to the public which the Federal Rules, and the contractual undertakings pursuant thereto, impose. We may also assume, without deciding, that INA, as [the named insured motor carrier's] certified liability insurer, could not absolve itself of a duty to make the initial payment of compensation to an injured member of the public, in the event that neither [the named insured motor carrier] **nor any other party involved** could answer financially for the damage. *Id.* at 137 (Bold added).

In other words, the Third Circuit *assumed* that the motor carrier's insurer would have to pay judgments obtained against the permissive users of the ICC regulated vehicles, whether they were the named insured motor carrier or not, in the event those parties could not

answer financially for the damage. That is exactly the case here: Sahota's permissive users who caused the subject accident, Blue Star and Garcha, cannot answer to LACMTA and Nueva in damages, and thus John Deere, as the liability insurer of the named insured motor carrier, must. Thus, both *Wellman, supra* and *Carolina Casualty, supra* actually support the decision of the Ninth Circuit in this case.

John Deere may cite in its reply brief (and Respondents are aware that these cases are cited in a motion for leave to file an amicus brief which may or may not be granted) *Radman v. Jones Motor Co., Inc.*, 914 F.Supp. 1193 (W.D. Pa. 1996), *aff'd*, 100 F.3d 948 (3rd Cir. 1996); *Pratt v. Andrews*, 518 N.E.2d 184 (Ill. Ct. App. 1987); *Nowak v. Transport Indem. Co.*, 358 N.W.2d 294 (Wis. Ct. App. 1984); and *Transport Indem. Co. v. Teter*, 575 S.W.2d 780 (Mo. Ct. App. 1978). None of these cases helps John Deere, if only for the fact that none of them is a Federal Circuit Court of Appeals case, and thus cannot create the "conflict" John Deere seeks to manufacture.

Radman did not deal with the interpretation of an MCS-90 Endorsement and the obligations it imposes upon insurers. Instead, *Radman* addressed the liability of a lessor for its lessee's accidents which occur while the lessee is using the lessee's owned vehicles. That is not the case here, where Sahota in fact was the owner of the Great Dane Trailer at issue, not Garcha or Blue Star. *Radman, supra*, 914 F.Supp. at 1195-1197, 1198-1202. Further, *Radman* cited *Wellman* and *Carolina Casualty, supra*, as persuasive authority for its decision. *Id.* at 1199-1201. These cases are distinguishable from the instant case, as is *Radman*.

Pratt also did not deal with the interpretation of the MCS-90 Endorsement or the obligations of an insurer under it. Instead, *Pratt* concerned a lessor's liability for not obtaining insurance on the lessee/vehicle owner's behalf. *Pratt, supra,* 518 N.E.2d at 184-185. That is not at issue in the instant case, and *Pratt* is of no utility to John Deere.

Transport Indemnity also did not construe the MCS-90 Endorsement, nor could it, inasmuch as that case was decided before the MCS-90 Endorsement was promulgated. Further, *Transport Indemnity* addressed the situation where a lessor is *automatically* vicariously liable under federal law for its lessee/driver/vehicle owner's liability. Thus, it was immaterial to that court to find that the insurance policy at issue covered the lessee/driver/owner, because the lessor was covered in any event and could respond in damages to injured members of the public. *Transport Indemnity, supra,* 575 S.W.2d at 785-786. Here, that is not the case.

Finally, *Nowak* is an inter-insurer dispute. *Nowak, supra,* 358 N.W.2d at 637. Thus, even if it obliquely addressed the MCS-90 Endorsement, which it does not, it has no application to the instant case.

In the final analysis, there is no conflict among the Circuits, despite John Deere's futile attempt to manufacture one. John Deere simply wants to avoid paying what it owes in this case. John Deere accepted two separate premiums from Sahota – one for the underlying policy and the other for the MCS-90 Endorsement. John Deere must now live up to its own contractual obligations. John Deere is the only insurer from whom Respondents, as

injured members of the public, can seek funds to compensate them for their severe injuries. If the Ninth Circuit's decision is overturned and John Deere is not held liable, despite all authority to the contrary, Respondents' injuries will go uncompensated. If that happens, the primary purpose behind the MCS-90 Endorsement – protection of the public – would be thwarted. John Deere must therefore pay any final judgments rendered against Blue Star and Garcha, as "insureds" under the John Deere policy pursuant to the MCS-90 Endorsement.

II. The Petition Should Be Denied Since Both The Express Language Of The John Deere Policy And The Plain Meaning Of The MCS-90 Endorsement Support The Ninth Circuit Ruling Below.

John Deere asserts that the issue presented by this case is "important and recurring." (Petition at page 26) John Deere further complains that the Ninth Circuit's decision is unfair "both to insurance companies and to the motor carriers that they insure," and "creates a series of perverse incentives that will expose insurers to liability without giving them the right or opportunity to defend the underlying claims." (Petition at page 26) These statements are disingenuous at best.

John Deere is hardly an uninformed party to a contract who now wishes to avoid the liability imposed by same. John Deere wrote its own policy to define "insured" to include not only its "named insured" but all those operating the named insured's owned vehicles with the named insured's permission and consent.

John Deere is also an insurer of truckers, having full knowledge that every policy it issued to a motor carrier regulated by the Motor Carrier Act of 1980 was required to contain an MCS-90 endorsement. John Deere knew that the MCS-90 endorsement expanded coverage to vehicles owned by its named insured regardless of whether or not said vehicles were specified in the policy. This is obvious, as there would be no point to the endorsement if it did not add this coverage to the policy. The premium charged for the Endorsement reflects knowledge that, regardless of whether or not a covered "auto" under the basic policy was involved, John Deere would have to pay judgments obtained by injured members of the public against the "insured" so long as the judgment resulted from the "operation, maintenance or use" of owned vehicles subject to ICC regulation.

Despite this knowledge, John Deere contends that Sahota is the only "insured" contemplated by the MCS-90 Endorsement, and that a judgment must first be entered against Sahota before it has any obligation to injured members of the public. John Deere thus contends that the Ninth Circuit's decision is "overbroad." (Petition at pages 13-19) John Deere is wrong.

The plain language of the MCS-90 Endorsement is to require the motor carrier's insurer to pay "any final judgments recovered against **the insured** for public liability. . . . " (Emphasis added). The Legislature did not use the phrases "named insured" or "motor carrier" in the required MCS-90 Endorsement or in the predecessor 1977 statute. Nor did it use the word "registrant" as in the statute enacted pursuant to the ICC Termination Act of 1995 (eff. 1996) (Petition at App. D, pages 36a-37a).

Indeed, the federal regulations show that the ICC knew how, and in what context, to use the words "motor carrier." (Petition at App. E, pages 38a-44a) Yet the words "insured" *and* "motor carrier" are used in the exemplar form MCS-90 Endorsement, and are not equated. 49 C.F.R. § 387.15 (Petition at App. E, pages 40a-43a) This indicates that the two terms do *not* mean the same thing under the regulations. Otherwise, the use of two terms to describe the same thing would be redundant, and regulatory language must be construed so as to avoid superfluity or redundancies. See, e.g., *Moskal v. United States*, 498 U.S. 103, 109-110 (1990); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Recognizing this legislative language and intent, both *Adams, supra*, and the Ninth Circuit decision in this case correctly interpret the MCS-90 Endorsement as providing coverage for permissive users of the named insured's owned vehicles – regardless of whether or not the named insured remembered to list all its owned vehicles on the declarations page. Any interpretation otherwise would frustrate the legislative intent and clear language of the MCS-90 Endorsement.

Contrary to John Deere's public policy/"fairness" argument that an insurer who is a stranger to the underlying action should not be held liable for judgments, it was no stranger here. John Deere was actively involved in the defense and indemnity of Sahota. It knew that defaults were being requested and then entered against Garcha and Blue Star. It *voluntarily* chose to do nothing. Thus, when John Deere implies it had no "right or opportunity to defend the underlying claims," John Deere is being less than forthright with this Court. (Petition at

page 26) John Deere could have defended both Garcha and Blue Star to prevent defaults being taken – John Deere chose to do nothing and should not be heard to complain.

Further, the Ninth Circuit's decision here, and the Tenth Circuit's in *Adams*, are fundamentally fair: as between the insurer and the motor carrier, the motor carrier *should* have the ultimate liability for accidents when it allows other persons to use regulated vehicles it owns without making sure that the permissive user has insurance. Indeed, that is the **very purpose** behind the reimbursement provision contained within the MCS-90 Endorsement. *Adams, supra*, 99 F.3d at 968; *Canal, supra*, 889 F.2d at 611.

John Deere further contends, based upon **unsubstantiated** figures regarding MCS-90 Endorsements issued, the number of vehicles they cover, and the number of trucking accidents in 1999,[15] [16] that "it is quite clear that the issue presented in this case will recur time and time again." (Petition at pages 27-28) The fact that there are only two cases dealing with the application of the MCS-90 Endorsement to the particular facts at issue here

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[15] A citation to the total number of tractor/trailer accidents in the United States in one year actually further supports the need for members of the public to be protected by the MCS-90 Endorsement language.

[16] John Deere also complains, with no support, that the Ninth Circuit's decision prompts drivers to enter into collusive default judgments with claimants, to the detriment of the insurers. To assert that actionable fraud and collusion would be the **likely** actions of uninsured drivers is not only unsupported, but ludicrous.

– the Tenth Circuit's in *Adams* and the Ninth Circuit's in this case, proves that statement wrong.

The answer as to why there are no other published decisions interpreting the MCS-90 Endorsement at issue is clear. The subject accident occurred on **November 24, 1995**. The accident in *Adams* occurred on **January 17, 1986**. Both accidents were governed by the Motor Carrier Act of 1980 and its applicable MCS-90 Endorsement required by the ICC. The Motor Carrier Act of 1980 was later superceded in 1996 by the enactment of the ICC Termination Act of 1995. Thus, there are no "current" accidents governed by the 1980 Motor Carrier Act, and there is no "urgency" created by the Ninth Circuit's decision below.

At any rate, whether there is one case or thousands dealing with these precise issues, the analysis does not change. MCS-90 Endorsements were created to eliminate the uncertainty as to which party would pay judgments, thereby securing an immediate source of funds for injured members of the public. See, e.g., *The Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261 (3rd Cir. 1991). Immediate compensation is thus the end, and the MCS-90 Endorsement is the means to that end. After compensation is secured, it is up to the liability insurer(s) and their insured(s) to allocate who is ultimately responsible for the loss. The injured members of the public, having obtained their compensation, are no longer in the fray. In other words, where an injured member of the public is involved, the purported hardship insurers and/or their named insureds face in allocating ultimate liability is beside the point.

In addition, federal law is quite clear that by requiring all insurance policies issued to interstate carriers to contain the MCS-90 Endorsement, the ICC prevents the possibility that, through inadvertence or otherwise, some of the motor carrier's owned vehicles may be uninsured, to the detriment of the public. *Adams, supra*, 99 F.3d at 968; *Canal, supra*, 889 F.2d at 611.

These principles are particularly applicable here. Sahota owned the Great Dane Trailer involved in the subject accident. The Great Dane Trailer was not specifically described under the basic John Deere policy. Respondents' damages and severe injuries therefore arose out of the use of one of Sahota's non-listed owned vehicles. The MCS-90 Endorsement comes into play by expanding coverage for vehicles owned by the named insured even though they may not be listed under the policy. The protection of the public is therefore served.

In sum, John Deere accepted premiums to provide the insurance at issue. It took those premiums knowing that Sahota could lend its vehicles to anyone in the United States, and that those persons might be "insureds" under the policy. It knew there was an MCS-90 Endorsement on the policy which by its very existence broadened coverage under the policy to include non-listed owned vehicles. Now John Deere is trying to extricate itself from the contractual obligations imposed by the MCS-90 Endorsement, and this should not be allowed to occur.

III. Even If There Was A Conflict Among The Circuits, The Supreme Court Could Decide This Case In Respondents' Favor Under California Law.

Even if there was a conflict among the Circuits, the Supreme Court could still decide the issues in favor of Respondents under California state law. Thus, John Deere's alleged "conflict" is not even sufficient cause to grant the Petition. See, e.g., *Sanson Hosiery Mills, Inc. v. NLRB*, 344 U.S. 863 (1952); *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

California Insurance Code Section 11580.1 mandates that with respect to any owned vehicle for which there is coverage under an automobile liability policy issued after 1970, a person using such vehicle with the owner's permission is to be afforded insurance coverage under the owner's insurance policy to the same extent as the owner is afforded coverage. Cal. Ins. Code § 11580.1(b)(4). (Respondent's Appendix A, page **) In other words, such permissive users become insureds under the insurance policy pursuant to statute.[17]

Insurance Code Section 11580.1 applies to the John Deere policy since it is an automobile liability policy. Sahota owned the Trailer and Blue Star and Garcha were using it with Sahota's consent and permission. John Deere also admits that the MCS-90 Endorsement provides coverage for Sahota's liability arising out of the use of the Trailer.

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[17] This statutorily mandated "omnibus clause" takes the place of any conflicting omnibus clause set forth in the body of the policy itself. See, e.g., *General Insurance Co. of America v. Truck Ins. Exchange*, 242 Cal.App.2d 419, 422 (1966); *Glens Falls Ins. Co. v. Globe Indem. Co.*, 276 Cal.App.2d 643, 646 (1969).

Since Sahota receives this coverage, the permissive users must also receive this coverage, pursuant to Section 11580.1(b)(4). John Deere therefore has the duty to indemnify/pay final judgments rendered against Garcha and Blue Star.

Although this issue was fully presented and briefed to the Ninth Circuit, that Court declined to reach Respondents' state statutory claim since it decided the issues in Respondents' favor under federal law. (Petition at App. A, page 15a) Nevertheless, the state statutory claim remains a viable alternative basis for denying this writ.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

JACQUELINE JORDAN LEUNG
(Counsel of Record)
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street
25th Floor
Oakland, CA 94604
(510) 834-4350

SANDRA B. STERN
THE LAW OFFICES OF SANDRA B. STERN
16133 Ventura Boulevard
Suite 1280
Encino, CA 91436-2416
(818) 905-5667

ROBERT J. STOLL, JR., ESQ.
STOLL, NUSSBAUM & POLAKOV
11601 Wilshire Boulevard
Suite 200
Los Angeles, CA 90025
(310) 996-7500

Attorneys for Respondents

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APPENDIX A

STATUTORY PROVISIONS INVOLVED (NOT OTHERWISE CONTAINED IN PETITIONER'S APPENDIX)

California Insurance Code Section 11580.1

§ 11580.1. Motor vehicle insurance; Required provisions; Allowable exclusions; Volunteer services; Mexican nonadmitted insurers

(a) No policy of automobile liability insurance . . . covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued or delivered in this state on or after the effective date of this section unless it contains the provisions set forth in subdivision (b). . . .

(b) Every policy of automobile liability insurance to which subdivision (a) applies shall contain all of the following provisions:

(4) Provision affording insurance to the named insured with respect to any owned or leased motor vehicle covered by the policy, and to the same extent that insurance is afforded to the named insured, to any other person using the motor vehicle, provided the use is by the named insured or with his or her permission, express or implied, and within the scope of that permission. . . .

HISTORY: Added Stats 1970 ch 300 § 4. Amended Stats 1971 ch 1564 § 3, effective November 17, 1971; Stats 1974 ch 1409 § 2; Stats 1975 ch 194 § 1; Stats 1976 ch 1145 § 3; Stats 1979 ch 1173 § 1; Stats 1980 ch 1320 § 1, effective September 30, 1980; Stats 1981 ch 36 § 1; Stats 1982 ch 736 § 1, ch 1539 § 2; Stats 1983 ch 389 § 2; Stats 1987 ch 800

§ 3; Stats 1993 ch 408 § 1 (AB 575). Amended Stats 1999 ch 313 § 3 (SB 1296).